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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GREGORY HARMAN,

Plaintiff and Appellant,

v.

CAROLE G. ELLIS et al.,

Defendants and Respondents.

G052102

(Super. Ct. Nos. 30-2013-00646251 and 30-2014-00718787)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Affirmed.

Webb & Carey and Patrick D. Webb, for Plaintiff and Appellant.

Bienert, Miller & Katzman, Kenneth M. Miller and Ariana Seldman Hawbecker, for Defendants and Respondents.

Gregory Harman appeals from an order striking his complaint against Carole G. Ellis and her son, Harry O. Ellis, Jr. (Harry Jr.),[1] pursuant to Code of Civil Procedure section 425.16 (the anti-SLAPP law). Harman contends the trial court erred in deciding that his complaint, which alleges a single cause of action, arose out of activity protected by the anti-SLAPP law, and also by concluding he failed to demonstrate a probability of succeeding on the merits of that cause of action. His contentions are unpersuasive and we affirm the order.

Harman characterizes his appeal as posing the initial question of "whether [the Ellises'] illegal conduct of eavesdropping on and recording of [his] private iMessages is protected activity." But that question describes only a portion of his cause of action. Harman's complaint alleges not only that the Ellises wrongfully read and copied his private text messages in violation of Penal Code section 502 (section 502), but also that they wrongfully published those messages in a public forum and disseminated them to their agents who "instituted civil actions" against him based on the content of the messages. He alleges that as a consequence, he suffered damages comprised of the $100,000 in attorney fees he incurred to defend those civil actions.

We conclude all of the Ellises' alleged activities—including the initial reading of Harman's messages—were protected by the anti-SLAPP law. Before Harman had even written the messages in question, which were directed to Michael Ellis, the son and brother of defendants, Carole had already become suspicious of wrongful conduct at the family company and had reason to believe her son Michael was conspiring with at least one other company employee to harm it. Thus, reading Michael's additional message exchanges with other company employees, including Harman, qualifies as an act in furtherance of the Ellises' lawsuit against Michael, and was thus protected petitioning

[1] We sometimes refer to the Ellises by their first names, solely for the sake of clarity. We mean no disrespect.

activity under the anti-SLAPP law. And of course, the Ellises' further activity, up to and including the actual filing and pursuit of that lawsuit, was likewise protected.

As to the merits of Harman's claims, it is beyond dispute that the pursuit of a lawsuit is privileged conduct under Civil Code section 47, and thus cannot be the basis of a tort claim for anything other than malicious prosecution. Each communicative act related to that lawsuit is covered by the privilege. In this case, the relevant provisions of section 502 relied upon by Harman to establish his cause of action require not only the accessing of computer data, but also the use of that data in some way. And the only evidence Harman offers of anyone using his messages describes communicative acts in furtherance of litigation. Because none of those acts can be the basis of imposing liability on the Ellises, Harman has failed to demonstrate a probability of prevailing on the merits of his claim.[2]

FACTS

Harman's cross-complaint arises in the context of a family business dispute. Carole and her late husband, Harry Ellis, Sr. (Harry Sr.), founded a company named Coast Pneumatics, Inc. (Coast). Their son, Michael, also worked for the company and was a minority shareholder.

In about 2012, Michael gave an iPad as a gift to Carole, who was then about 78 years old. Carole had no idea how the iPad worked, and Michael set it up for

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[2] Just before oral argument, the Ellises filed a request that we take judicial notice of a new complaint (and related docket) Harman has filed against them, but not yet served. The Ellises claim this complaint represents an effort by Harman to circumvent the anti-SLAPP ruling in this case, and is relevant as further evidence of the "gamesmanship" that already got him sanctioned by the trial court. But neither his gamesmanship nor those earlier trial court sanctions are at issue in this case—only the merits of the Ellises' anti-SLAPP motion are. And to the extent Harman's initiation of a new case against the Ellises may expose him to further sanctions, those sanctions would have to be sought and awarded in that new case. We deny the request.

her and showed her how to use it. Carole did not have an account with Apple, although Michael did.

Carole rarely used the iPad other than as a means of looking at photographs sent to her by friends. However, at some point Carole realized the iPad received messages through its iMessage program which appeared to be messages between Michael and others. Initially Carole paid little attention to the messages, which she realized were not directed to her, other than to note some of them included photos of horses and horse properties Michael was interested in buying.

However, when Carole's husband complained to her about the fact an employee of Coast had been given another phone after he had requested the employee's original phone be taken away, Carole remembered seeing a reference to the same incident in some of the iPad messages, and she "began to get suspicious." She and Harry Sr. discussed it, and decided he would ask one of Coast's employees, Michele Awaa, for a list of checks written on Coast's account.

Awaa "made excuses" and delayed in providing the checking records to Harry, Sr. That delay was apparently explained in a series of messages between Awaa and Michael that appeared on Carole's iPad on January 30, 2013. One of the messages said, "He just asked me to run him a check report that shows all check [sic] written in the last three months." The response was "Can you omit the bad ones?"

The next day, messages exchanged between Michael and Harman, who was a technology consultant also employed by Coast, appeared on Carole's iPad. Those messages suggested the two were working together to set up a computer system for use by a company that "will do the same thing as Coast." The system was to include "100% of everyone's e-mails. Plus 100% of all the drawings."

In April 2013, Coast, along with Harry Sr. and Carole, filed a complaint against Michael, Awaa, Harman, and a company called Orange Coast Pneumatics. The complaint alleged the individual defendants had misappropriated money from Coast and

that with the assistance of Harman, had stolen customer data, drawings, supplier lists and other proprietary information stored on Coast's computer servers.

When they filed the complaint, Carole and Harry Sr. also filed an application for a temporary restraining order, supported in part by Carole's declaration. In the declaration, Carole related the circumstances of her discovery of the messages on her iPad, and attached print-outs of the messages as exhibits.

In April 2014, a year after Coast and the Ellises filed their lawsuit, Harman initiated this lawsuit against Carole. However, Harman's operative first amended complaint, which names both Carole and Harry Jr. as defendants (Harry Sr. had since passed away), was filed in September 2014.

That amended complaint alleges that in or around January and February 2013, Harman sent "private and confidential internet messages" to Michael, and received messages from Michael. Harman allegedly had "an expectation of privacy" as to the messages. However, in May 2013, Harman discovered that Carole "had intercepted the i-messages between Harman and Michael Ellis."

Moreover, "Carole Ellis failed and refused to contact [Harman] and notify him that she had received the i-messages" and she "failed and refused to delete the i-messages . . . from her electronic device and/or computer." Instead, Carole allegedly "disseminated the i-messages to [Harry Jr.] who, upon receipt of the private i-messages, in turn disseminated the i-messages to one or more of the DOE Defendants who then published the i-messages in a public forum"

The complaint acknowledges "Carole Ellis may have initially received the i-messages in error," but alleges "she nonetheless knew that the i-messages were not directed to or intended for her and she continued to access, maintain, store, and disseminate the i-messages to third parties." The complaint also alleges Harry Jr. "knew that Harman's private and confidential i-messages were not directed to or intended for him," yet he nonetheless disseminated the messages to third parties without Harman's

authorization. Further, those third parties, acting on behalf of Carole and Harry Jr., "instituted civil actions against Harman . . . solely based upon allegations wrongfully and erroneously inferred from the content of the i-messages." Harman allegedly "incurred resulting damage in the form of attorneys' fees in having to defend [the] actions." The amount of those attorney fees "exceeds the sum of $100,000."

The complaint then alleges Carole and Harry Jr. are guilty of a public offense in three ways: First, "they accessed, and without the permission of Harman, used and published the i-messages in order to devise or execute a scheme or artifice to extort Harman under the color of legal authority; and/or to wrongfully control and publish the confidential data in a public forum." Second, "they each knowingly accessed and without the permission of Harman took, copied, disseminated, published and/or made use of the data comprising the i-messages which resided in Harman's computer system or computer network." And third, "they knowingly and without permission of Harman provided and/or assisted third parties with a means of accessing the i-messages between Harman and Michael Ellis." Each of those wrongs is alleged to be a violation of section 502.[3]

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[3] The complaint actually recites, in conclusory fashion, that the Ellises' conduct amounted to violations of both Penal Code sections 502 and 632, but on appeal Harman repeatedly insists he "only sued under Penal Code [s]ection 502"

What Penal Code section 632 prohibits is eavesdropping. It states, in pertinent part: "Every person who, intentionally and without the consent of all parties to a confidential communication, *by means of any electronic amplifying or recording device*, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment." (Pen. Code, § 632, subd. (a), italics added.)

In addition to the more than $100,000 in attorney fees Harman allegedly incurred defending the civil actions, he claims his damages would include "any expenditure [he] reasonably incurred . . . to verify that his computer system . . . or data was not altered, damaged, or deleted by the unauthorized access." However, the complaint did not allege Harman actually incurred such damages.

The Ellises moved to strike the complaint pursuant to the anti-SLAPP law. They argued Harman's cause of action arose out of their protected acts associated with the filing of a lawsuit, and that he could show no likelihood of prevailing on the merits because (1) the disputed messages had been innocently received by Carole, not wrongfully taken from anyone, and (2) the messages were then used solely for privileged purposes – i.e., the preparation and filing of a lawsuit, and the filing of a police report.

The trial court agreed with the Ellises. It reasoned that even if Carole's initial receipt and review of the messages had not been protected conduct under the anti-SLAPP law, the subsequent use of the messages in connection with filing a police report and the initiation of a lawsuit was protected. And because the only damages Harman allegedly incurred arose from the latter protected conduct, it was not "merely incidental" to the cause of action. The court also concluded Harman had failed to show a likelihood of success on the merits of his cause of action because he offered no evidence suggesting Carole's receipt and review of his messages constituted a violation of section 502. Further, the use of the messages in pursuing a lawsuit was privileged and could not be the basis for damage claim.

The italicized language presumably demonstrates why Harman now eschews reliance on the statute. Nowhere does he claim the Ellises used any electronic amplifying or recording device to obtain his messages. And to the extent Harman is implying Carole's iPad would qualify as such a device, he offers no authority for that claim. Nor does he explain how Carole's passive and *unintentional* receipt of messages on that iPad would qualify as a crime under Penal Code section 632. But even assuming they could, Harman fails to explain how that criminal conduct would also constitute a violation of section 502.

DISCUSSION

1. *The Anti-SLAPP Law and Standard of Review*

The anti-SLAPP law states, in pertinent part, that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1).) "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law. . . ." (Code Civ. Proc., § 425.16, subd. (e).)

We apply a two-pronged analysis to an anti-SLAPP motion, "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity. [Citation.] If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

We apply a de novo standard of review to an order granting or denying a motion to strike under anti-SLAPP law. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

1.1 First Prong Analysis

Harman first asserts the trial court erred in concluding his complaint arose out of protected activity. Specifically, he asserts the court erred because his complaint was based solely on the Ellises' alleged violation of section 502, which was not protected activity, rather than on their subsequent use of his messages as the basis of their lawsuit against him. As he explains it, "[n]ohwere in the complaint does [he] allege that he is suing [the Ellises] because they subsequently provided the text of the iMessages to law enforcement or filed the iMessages in a public forum." We disagree. Harman's complaint clearly relies on both Carole's initial review of his messages and the Ellises' subsequent use of those messages as the basis for initiating litigation. Moreover, we conclude that even the initial review was protected conduct.

The Anti-SLAPP law applies to "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue" and states it "shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1).) "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) *any other conduct in furtherance of the exercise of the constitutional right of petition* or the constitutional right of free speech

in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e), italics added.)

As explained in *Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, all litigation qualifies as protected petitioning activity under the anti-SLAPP law: "Any matter pending before an official proceeding possesses some measure of 'public significance' owing solely to the public nature of the proceeding, and free discussion of such matters furthers effective exercise of the petition rights section 425.16 was intended to protect. The Legislature's stated intent is best served, therefore, by a construction of section 425.16 that broadly encompasses participation in official proceedings, generally, whether or not such participation remains strictly focused on 'public' issues." (*Briggs* at p. 1118; *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087, where the court stated: ["the filing of a judicial complaint satisfies the 'in connection with a public issue' component of section 425.16, subdivision (b)(1) because it pertains to an official proceeding"].)

Moreover, as this court has pointed out, "[t]he anti-SLAPP protection for petitioning activities applies not only to the filing of lawsuits, but extends to conduct that relates to such litigation, including statements made in connection with or in preparation of litigation." (*Kolar v. Donahue McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1537.) In fact, courts have adopted "a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16." (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908; see *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777 [anti-SLAPP law protected law firm conducting an investigation in anticipation of filing a complaint with the Attorney General].)

Applying that expansive standard, we conclude all of the Ellises' conduct, including Carole's initial reading of Harman's messages, was protected conduct under the anti-SLAPP law. As Carole explained in her declaration, she knew Michael's messages were appearing on the iPad he gave her, but paid no particular attention to them until her

late husband, Harry Sr., complained about a company employee being given a new cell phone after he had requested that employee's phone be taken away. Because she noticed some of Michael's messages had related to the same issue, Carole "began to get suspicious" and Harry Sr. decided to follow up with Awaa, the company employee charged with keeping the company's checking records. However, Awaa delayed producing the records, and instead exchanged messages with Michael which strongly suggested they were conspiring to hide improper expenditures of company funds. It was only *after* Carole had read those messages, and was alerted to the fact Michael was likely engaging in a conspiracy to harm the company, that Harman and Michael exchanged the messages Harman complains about Carole reading. But by that point, Carole was no longer paying scant attention to Michael's messages on her iPad. Instead, she was reviewing the messages he exchanged with other company employees in furtherance of her right to pursue a claim against him. Consequently, that review was protected petitioning-related activity.

And of course, the Ellises' further acts of copying those messages and then providing them to third parties—who in turn allegedly used the messages as the basis for filing a lawsuit against Harman on behalf of the Ellises—are protected as well. In fact, the Ellises' entire course of conduct, as alleged in the complaint, leads up to the sole item of damages Harman claims to have suffered: i.e., the $100,000 in attorney fees he allegedly incurred as a consequence of being sued by the Ellises.[4] Thus, it is clear Harman's cause of action arises solely out of the Ellises' protected petitioning-related activity.

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[4] Harman also alleges his entitlement to damages includes "any expenditure reasonably incurred by [him] to verify that his computer system, computer network, computer program, or data was or was not altered, damaged or deleted by the unauthorized access." That allegation tracks language from section 502, subdivision (e)(1), but Harman does not allege he has actually incurred such expenditures.

Harman nonetheless argues that even if his complaint alleged the *type* of conduct theoretically protected by the anti-SLAPP law, the trial court nonetheless erred in finding this conduct protected because the alleged actions of the Ellises were illegal as a matter of law. He relies on *Flatley v. Mauro* (2006) 39 Cal.4th 299, 317 (*Flatley*), in which our Supreme Court stated, "section 425.16 cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition." We reject this contention as well.

As the Ellises point out, this illegality exception to the anti-SLAPP law applies only in narrow circumstances where "either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law." (*Flatley, supra,* 39 Cal.4th at p. 320.) Here, although Harman asserts the Ellises "concede that the recorded and printed text of the iMessages violate state and federal law, as the text of the iMessages is attached to the declaration of Carole Ellis," that assertion is untrue. While the Ellises would presumably concede that the text of the messages is attached to Carole's declaration, they certainly do not concede it was illegal for them to have attached it. Nor do they concede that any of their other alleged conduct was illegal, and Harman makes no effort to demonstrate *the evidence* conclusively establishes it was.

Instead, Harman simply asserts in conclusory fashion—and relying on selectively emphasized phrases from Penal Code sections 502 and 632—that the things he *alleges* the Ellises' did are made illegal by those statutes. But Harman's allegations of illegality do not equate to what *the evidence* establishes, and thus his assertion is not sufficient to demonstrate the Ellises' conduct was unprotected by the anti-SLAPP law as a matter of law: "If . . . a factual dispute exists about the legitimacy of the defendant's conduct, it cannot be resolved within the first step but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits."

(*Flatley, supra*, 39 Cal.4th at p. 316.) We consequently conclude the Ellises have met their burden under the first prong of the anti-SLAPP law and turn our attention to that second prong.

1.2 Second Prong Analysis

If the defendant or cross-defendant satisfies the first prong on the anti-SLAPP analysis, the burden shifts to the pleader to demonstrate the "probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1); *Collier v. Harris* (2015) 240 Cal.App.4th 41, 49-50.)

"To satisfy the second prong, 'a plaintiff responding to an anti-SLAPP motion must "'state[ ] and substantiate[ ] a legally sufficient claim.'" [Citation.] Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."' [Citation.] 'We consider "the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based." [Citation.] However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law."'" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.)

The claim Harman stated rests primarily on his assertion the Ellises violated section 502, which identifies various computer crimes. Harman alleges the Ellises violated the statute in three ways: First, they "accessed, and without the permission of Harman, used and published the i-messages in order to devise or execute a scheme or artifice to extort Harman under the color of legal authority; and/or to wrongfully control and publish the confidential data in a public forum." Second, they "knowingly accessed and without the permission of Harman took, copied, disseminated, published and/or made use of the data comprising the i-messages which resided in

Harman's computer system or computer network." And third, they "knowingly and without permission of Harman provided and/or assisted third parties with a means of accessing the i-messages between Harman and Michael Ellis."

The first two of those allegations closely mirror language taken from section 502, which states in pertinent part that "[e]xcept as provided in subdivision (h), any person who commits any of the following acts is guilty of a public offense: [¶] (1) Knowingly accesses *and* without permission alters, damages, deletes, destroys, or *otherwise uses any data*, computer, computer system, or computer network in order to either (A) devise or execute any scheme or artifice to defraud, deceive, or extort, or (B) wrongfully control or obtain money, property, or data. [¶] (2) Knowingly accesses *and* without permission *takes, copies, or makes use of any data* from a computer, computer system, or computer network, or takes or copies any supporting documentation, whether existing or residing internal or external to a computer, computer system, or computer network." (§ 502, subd. (c)(1), (2), italics added.) Significantly, neither of those provisions is violated by the mere *accessing* of computer data. Instead, both require the wrongdoer to have also done something with the computer data.

The third allegation, however, does not describe any violation of section 502. It bears the most similarity to section 502, subdivision (c)(6), which prohibits providing or assisting in providing "a means of accessing a computer, computer system, or computer network in violation of this section," and section 502, subdivision (c)(7), which prohibits accessing or causing to be accessed "any computer, computer system, or computer network." But neither of those provisions prohibits the accessing of *computer data*. Merely accessing computer data, or providing others with the means to do so, does not violate section 502.

Finally, Harman's complaint also suggests that once the Ellises realized they were in possession of his messages, they were obligated to (1) notify him of that fact, (2) delete those messages, and (3) refrain from disseminating the messages to any

third parties. But section 502 places no such obligations on a person who receives computer data not intended for him or her.

At most, then, Harman stated a claim against the Ellises for violation section 502 in only two ways, both of which require they have done something with the computer data they allegedly accessed. But the Ellises strongly contend that no violation of the statute could be stated against persons such as them, who merely accessed and used the data that appeared *on Carole's own computer* without either of them having done anything wrongful to make that happen. Their position is supported by *Chrisman v. City of Los Angeles* (2007) 155 Cal.App.4th 29 (*Chrisman*), which concludes the definition of "access" included in section 502 does not describe "the ordinary, everyday use of a computer;" rather, "[s]ection 502 defines 'access' in terms redolent of 'hacking' or breaking into a computer." (*Chrisman, supra* 155 Cal.App.4th at p. 34.) And of course, there is no allegation in Harman's complaint that either of the Ellises engaged in such wrongful conduct. To the contrary, the complaint expressly acknowledges that Carole "may have initially received the i-messages in error."

Although the trial court agreed with that analysis, we need not address it because we conclude that even assuming the Ellises' alleged conduct could qualify as a violation of section 502, Harman failed to demonstrate a probability of prevailing on that claim in the circumstances of this case.

Harman submitted three declarations to substantiate his claim. One declaration was from a computer expert, who opined that iMessages qualified as "data" and explained they are encrypted from the time they are sent until received by the recipient. Further, Harman's expert explained the iMessages are addressed to specific recipients by way of a specific Apple ID number assigned to that recipient, and they are designed to be secure.

Harman also submitted a declaration from Michael, who stated he did not give Carole "consent or authorization to eavesdrop on or monitor any of my private

iMessage communications with any of the intended recipients," and also claimed that his iPhone and Apple ID were personal to him, and were not the property of Coast. However, Michael did not address, let alone dispute, Carole's claim he had given her the iPad on which she received his iMessages, and he had set it up for her to use.

Harman's third declaration was his own, in which he stated that he expected his messages would remain confidential, that neither he nor Michael (the intended recipient) expected the messages to be read by anyone other than themselves, and that both Carole and Harry Jr. knew the messages were not intended to be shared with them.

But as we have already noted, the relevant provisions of section 502 do not prohibit the mere accessing of computer data, even assuming that data was intended by its creators to be confidential. Instead, those provisions are violated only when the data is accessed without permission and then *taken, copied, or used* in some way. And the only evidence Harman submitted to establish the Ellises' use of his messages—included within his own declaration—reflects only that Carole copied and shared his messages *in the context of litigation*.

Specifically, Harman first claims Carole attached a copy of the messages to a declaration she filed on behalf of the Ellises' company, Coast, in litigation filed against him (what he refers to as the "Main Action"). Second, he states she attached the messages to a declaration she filed on behalf of Coast in separate litigation initiated against it by his own company, Quest Digital (what he refers to as the "Quest Action"). Third, he claims she "provided [his] iMessages to her son, Harry O. Ellis, Jr., who testified under oath at his deposition that he is the C.E.O. of Coast." And fourth, he claims "she provided a printout of my private iMessages to Harry Ellis, Jr., to Coast, to her counsel in the Main Action, and ultimately to Coast's counsel in the Quest Action."[5]

[5] Harman actually alleges no facts to back up his allegations that *Harry Jr.*, as opposed to Carole, also copied or made some use of his messages.

None of those allegations suggest Carole, or anyone else, made use of Harman's messages outside of the litigation context.

As Harman implicitly acknowledges, the trial court below concluded he had no probability of prevailing because the Ellises' use of the messages in a judicial proceeding was covered by the litigation privilege found in Civil Code section 47, subdivision (b). We agree with that conclusion. The litigation privilege protects a "publication" made in "any . . . judicial proceeding" (Civ. Code., § 47, subd. (b)), and it extends beyond the judicial proceeding itself, to include communications made in anticipation of the proceeding or in connection with it. (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1194 ["communications with 'some relation' to an *anticipated* lawsuit are . . . within the privilege"]; *Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 [privilege covers communications made "to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved"].) A privileged publication cannot be used as the basis for any tort claim other than a malicious prosecution claim. (*Komarova v. National Credit Acceptance, Inc.* (2009) 175 Cal.App.4th 324, 336.)

However, Harman argues the Ellises are not entitled to rely on the litigation privilege because their conduct of filing his messages with the court falls within an exception to that privilege. Specifically, Harman relies on subdivision (d)(2) of Civil Code section 47, which exempts from privilege "any communication to a public journal that does any of the following: [¶] . . . [¶] (C) Violates any requirement of confidentiality imposed by law." He misreads the statute, and thus his reliance on this exception is misplaced.

Civil Code section 47 establishes several *distinct* privileges, set forth in separate subdivisions of the statute. The *litigation* privilege is set forth in subdivision (b), and the subdivision then specifies several exceptions to *that* privilege. (See Civ. Code, § 47, subd. (b)(1), (2), (3) & (4).) The privilege set forth in subdivision (d) is one made

applicable to "a fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof." (Civ. Code, § 47, subd. (d)(1).) Subdivision (d)(1) then specifies several exceptions to *that privilege*, including the one set forth in subdivision (d)(2)(C). Because the Ellises were not accused of reporting Harman's messages in a "public journal," as described in subdivision (d)(2), the exception to that privilege set forth in subdivision (d)(2)(C) has no application to this case.

Harman's reliance on *Scalzo v. Baker* (2010) 185 Cal.App.4th 91 (*Scalzo*), is also misplaced. He claims *Scalzo* stands for the proposition the litigation privilege "does not protect illegal conduct that results in damage unrelated to the use of that conduct in litigation," thus, where "damages separate from the litigation are demonstrated, the alleged wrongful, potentially criminal activity, is not immunized." (*Id.* at p. 100.) In *Scalzo*, the defendant allegedly obtained the plaintiffs' credit card records through the use of subterfuge, claiming he was an account holder who needed the information for tax purposes. He then used the information in connection with a lawsuit, but also for other purposes. (*Scalzo, supra*, 185 Cal.App.4th at pp. 94-95.) The plaintiffs alleged his wrongful accessing and use of their information constituted identity theft, and had caused them injury in the form of damaged credit. (*Scalzo, supra*, 185 Cal.App.4th at p. 96.) The court concluded their cause of action was not automatically defeated by the litigation privilege because (1) the defendant had obtained the credit card information through arguably illegal means and it was unclear he had done so for purposes of the lawsuit, and (2) the plaintiffs had incurred damages unrelated to any use of those records in the lawsuit. (*Scalzo, supra*, 185 Cal.App.4th at pp. 101.)

But this case is distinguishable from *Scalzo* in several ways. First, because there is no evidence the Ellises obtained Harman's messages through illegal means; as we have already explained, section 502 does not criminalize the mere accessing of computer data, and Harman nowhere alleges the Ellises wrongfully accessed a computer or

computer system. Nor is there any evidence they did. Second, there is no evidence the Ellises used the messages for any purpose other than the litigation. Finally, and most significantly, the only damages Harman allegedly suffered were *directly related* to the Ellises' use of the messages in litigation. Indeed, as we have previously noted, the only damages Harman claims to have incurred were the attorney fees in defending that litigation.

Consequently, *Scalzo* is of no assistance to Harman in defeating application of the litigation privilege in this case, and we therefore conclude the privilege applies to all of the Ellises' alleged acts giving rise to his lawsuit. Consequently, Harman has failed to demonstrate a probability of prevailing on his claim against the Ellises, and we find no error in the trial court's grant of their special motion to strike his complaint pursuant to the anti-SLAPP law.

DISPOSITION

The order is affirmed. The Ellises are entitled to their costs, as well as to an award of additional attorney fees on appeal. We remand the case to the trial court with instructions to determine the amount of the attorney fee award. (See *Wilkerson v. Sullivan* (2002) 99 Cal.App.4th 443, 448.)

O'LEARY, P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.